Supreme Court, U.S.
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No. 02-1809

(5)

In The Supreme Court of the United States

J. ELLIOTT HIBBS, in his official capacity as Director of the Arizona Department of Revenue,

Petitioner,

v.

KATHLEEN M. WINN, Arizona taxpayer;
DIANE WOLFTHAL, Arizona taxpayer;
MAURICE WOLFTHAL, Arizona taxpayer;
LYNN HOFFMAN, Arizona taxpayer,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY BRIEF

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INTRODUCTION

Unable to hide the split in the circuits concerning the scope of the Tax Injunction Act, Respondents belatedly attempt to persuade the Court that it lacks jurisdiction to hear the Petition. The Court has jurisdiction over the Petition because the Court of Appeals for the Ninth Circuit suspended the finality of the judgment while it considered whether to rehear this case en banc and Petitioner timely filed the Petition within ninety days of the Court's denial of the rehearing request.

Respondents also misleadingly attempt to minimize the circuit conflict. There is a conflict among the circuits regarding the scope of the Tax Injunction Act and principles of comity that preclude federal court interference with state tax systems. The First, Fifth, Sixth, and Eleventh Circuits have recognized that either the Tax Injunction Act or the principles of comity preclude federal court interference with state tax systems. The Ninth Circuit's opinion in this case, which holds that the Tax Injunction Act does not preclude a challenge to Arizona's tax credit for donations to a school tuition organization (STO),[1] plainly conflicts with the decisions of these circuit courts.

Finally, Respondents erroneously argue that the term "assessment" in the Tax Injunction Act is synonymous with

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[1] Respondents' argument that Arizona's tax credit for donations to an STO is different from the voucher program that the Court recently upheld in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), is irrelevant to the issue presented in the Petition. The argument is also incorrect. In *Zelman*, this Court held Ohio's school voucher program did not violate the Establishment Clause because the program was neutral with respect to religion and provided "assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice." *Id.* at 652. Like Ohio's voucher program, Arizona's STO credit is neutral with respect to religion and provides a tax credit to a broad class of citizens who, as a result of their own genuine and independent private choice, donate money to organizations that provide scholarships to students attending religious schools.

the term "collection" in that Act. Respondents' argument is contrary to the plain meaning of "assessment," well established rules of statutory construction, and this Court's decisions recognizing the importance of the principles of comity that require federal courts to refrain from interfering with the administration of state taxes.

This Court should grant the Petition to resolve the conflict in the circuits concerning the scope of the Tax Injunction Act.

REASONS FOR GRANTING PETITION

I. The Petitioner Filed the Petition for Certiorari Within the Jurisdictional Time Limit.

Respondents argue that the Petition is untimely because the Petitioner did not file it within ninety days after the court of appeals entered judgment on October 3, 2002. Respondents' argument fails because the court of appeals suspended the finality of the October 3, 2002 judgment while it considered whether to rehear the matter en banc and Petitioner filed the Petition within ninety days of the Court's decision denying the request for rehearing en banc.

This Court has consistently treated timely filed petitions for rehearing "as tolling the start of the period in which a petition for certiorari must be sought until rehearing is denied or a new judgment is entered on the rehearing." *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990). This is because "[a] timely petition for rehearing . . . operates to suspend the finality of the . . . court's judgment, pending the court's further determination whether the judgment should be modified to alter its adjudication of the rights of the parties." *Id.* at 46 (quoting *Dep't of Banking v. Pink*, 317 U.S. 264, 266 (1942)). "[W]hile the petition for rehearing is pending, there is no 'judgment' to be reviewed." *Id.*

The Ninth Circuit General Orders allow any judge to suspend the finality of a judgment by sua sponte calling for a vote on rehearing en banc. Pursuant to General Order 5.4(c)(3), any judge may sua sponte call for a vote on rehearing en banc within seven days of the expiration of the time for filing a petition for panel rehearing. After receiving a

timely sua sponte en banc call, the author of the panel opinion ordinarily enters an order directing the parties to file simultaneous briefs within twenty-one days setting forth their respective positions on whether the court should rehear the matter en banc. *Id.* Under General Order 5.4(d), if a judge makes a sua sponte call in a case in which no petition for rehearing has been filed, the judge shall direct the clerk of the court to stay the mandate and notify the panel.

In this case, the Ninth Circuit suspended the finality of the October 3, 2002 judgment. After the panel issued its decision on October 3, 2002, neither party filed a motion for rehearing. A judge in the Ninth Circuit requested a vote on whether to rehear the matter en banc. Pet. App. 1. Although the court issued its mandate on October 25, 2002, it recalled the mandate on October 28, 2002,[2] and, on November 13, 2002, directed the parties to file simultaneous briefs concerning whether the Ninth Circuit should hear this case en banc. Respondents' Brief in Opposition (Op.) App. 1, 2. In response to the court's order, Petitioner urged the court to rehear the case en banc and Respondents objected to such a rehearing. On March 5, 2003, the court issued its order denying "[t]he request for rehearing en banc." Pet. App. 1. Petitioner timely filed the Petition for Certiorari on June 3, 2003.

Respondents argue that the Petition was not timely filed under Supreme Court Rule 13.1 because neither party filed a timely request for rehearing. But Petitioner *did* file a timely request for rehearing en banc after the court asked for briefing on that issue. Respondents cite no authority to support their argument that Rule 13.3 will only toll the time for filing a petition for certiorari if it is filed by a party on its own initiative instead of in response to a court order.

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[2] The Ninth Circuit did not abuse its discretion in recalling the mandate to correct a clerical or administrative error. *See Lamb v. Farmers Ins. Co.*, 586 F.2d 96, 97 (8th Cir. 1978); 16 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3938 at 720 (2d ed. 1996) (recognizing that the court has the authority to correct missteps by the court or parties by recalling the mandate).

And, Respondents' argument is contrary to the rationale of this Court's decisions and the principle of judicial economy. *See Jenkins*, 495 U.S. at 46 ("while the petition for rehearing is pending, there is no 'judgment' to be reviewed"); *Bowman v. Loperena*, 311 U.S. 262, 266 (1940) (when an untimely petition for rehearing is filed and "the court allows the filing and, after considering the merits, denies the petition, the judgment of the court as originally entered does not become final until such denial, and the time for appeal runs from the date thereof"). Indeed, the court specifically assured Petitioner that it had suspended the finality of the judgment here by ordering the parties to brief the rehearing issue and recalling the prematurely issued mandate. Reply App. 1. To require Petitioner to file a petition for certiorari while the court of appeals is considering whether to rehear the matter en banc would waste both judicial and the parties' resources.

The Court must also reject Respondents' argument that the sua sponte call for a rehearing en banc vote appears to have been untimely. Respondents acknowledge that the parties do not know if the sua sponte call was within the twenty-one days required by the Ninth Circuit's General Order 5.4(c)(3). Op. at 11-12. Moreover, General Order 5.1(b)(2) gives the en banc coordinator the authority to extend, suspend, or compress the time schedules in the En Banc Procedures Chapter for good cause. Because the Ninth Circuit assured Petitioner that it had suspended the finality of the judgment, Reply App. 1, it is apparently satisfied that it has complied with its General Orders. This Court need not inquire further. The Court has jurisdiction over the Petition because Petitioner filed it within ninety days of the Ninth Circuit's denial of the rehearing request.

II. The Respondents Fail to Diminish the Conflict that Exists Between the Ninth Circuit's Decision and Decisions of the First, Fifth, Sixth, and Eleventh Circuits.

The Respondents attempt to diminish the conflict between the decision below and the decisions of the First, Fifth, Sixth, and Eleventh Circuits, by misconstruing the

holdings in those cases and ignoring key similarities. The Respondents also misconstrue decisions in other circuits in a failed attempt to establish that these decisions support the Ninth Circuit's opinion in this case.

Initially, the Respondents concede that the Ninth Circuit's decision is "out of step" with *American Civil Liberties Union Foundation v. Bridges*, 334 F.3d 416 (5th Cir. 2003), *reh'g and reh'g en banc denied*, No. 02-30493 (5th Cir. July 29, 2003). Op. at 24. Although the Respondents acknowledge that the Fifth Circuit expressly recognized that its decision conflicted with the Ninth Circuit's decision below, they nevertheless argue that the Fifth Circuit's decision is an "anomaly," and the court got it wrong because of two "important factual differences." Op. at 19, 23. These "differences," however, in no way diminish the conflict that now exists between the two circuits. First, Respondents note that *Bridges* recognized that declaring Louisiana's tax exemptions to be unconstitutional may not result in the State collecting more taxes because the State may simply exempt more entities in response to any court decision striking the exemptions down. *Id.* Surprisingly, the Respondents then argue that the same potential loss as a result of the federal district court action below is not present here. *Id.* Under the reasoning in *Bridges*, however, the same potential loss certainly exists in Arizona because the Arizona Legislature may choose to enact other credits in response to invalidation of the STO credit. Second, the Respondents argue that the cases are distinguishable because *Bridges* dealt with tax exemptions instead of tax credits. There is no analytical difference between the two. Both accomplish the same objective, which is relief from state taxation, and both affect the final assessment of an individual's tax liability. *Cf. Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 236 (1987) (Scalia, J., dissenting) ("Our opinions have long recognized – in First Amendment contexts as elsewhere – the reality that tax exemptions, credits, and deductions are 'a form of subsidy that is administered through the tax system' . . .") (internal citation omitted).

Contrary to Respondents' contention, *Bridges* is not an anomaly. It is consistent with *In re Gillis*, 836 F.2d 1001 (6th Cir. 1988), which Respondents fail to distinguish adequately. The *Gillis* court specifically rejected the argument that comity should not be invoked if an action may result in an order to state tax officials that could increase taxes. The Respondents argue that *Gillis* is limited only to situations in which the interference with a state tax system would be the same in degree and kind as those seeking to destroy a State's ability to raise revenue. Op. at 22. The court, however, viewed the principle of comity much more broadly and even noted that the very existence of a suit unduly intrudes on administration of a State's tax system. *Id.* at 1009. The Fifth Circuit expressly acknowledged that its holding in *Bridges* was consistent with *In re Gillis* and inconsistent with the decision below. *Bridges*, 334 F.3d at 422.

United States Brewers Association, Inc. v. Perez, 592 F.2d 1212 (1st Cir. 1979), and *Colonial Pipeline Company v. Collins*, 921 F.2d 1237 (11th Cir. 1991) are also consistent with *Bridges*. In *Perez*, 592 F.2d at 1215, the First Circuit found that a federal anti-tax injunction statute applicable to Puerto Rico, which contains essentially the same language as the Tax Injunction Act, prohibits relief that requests an order that some taxpayers be taxed more. Although that case did not involve a tax credit, the result would have been to increase tax revenue. There is no meaningful distinction between *Perez* and what Respondents seek to do here. The Respondents argue that the Eleventh Circuit dismissed *Collins* under the Tax Injunction Act only because it concluded that the suit would have required a massive federal judicial intervention into virtually all phases of Georgia's ad valorem tax system. Op. at 22. This argument, however, oversimplifies the court's holding and ignores its rationale. The Eleventh Circuit characterized the argument that the Tax Injunction Act does not apply when the requested relief would enlarge tax revenues as "overly literal and technical," 921 F.3d at 1242, thus rejecting the Ninth Circuit's rationale. The court further found such intervention would "clearly conflict with the principle underlying the Tax Injunction Act that the

federal courts should generally avoid interfering with the sensitive and peculiarly local concerns surrounding state taxation schemes." *Id.*

Furthermore, the Respondents overstate the extent to which other circuit courts agree with the Ninth Circuit's ruling below. In any event, the courts' differing rationale in these cases illustrates that this Court should resolve the conflict.

The language that Respondents quote from *Dunn v. Carey*, 808 F.2d 555 (7th Cir. 1986), Op. at 20, may be disregarded as dicta. As the court notes, the "district judge was not requested in this case to interfere with the collection of a tax; he was asked to interfere with the conduct of litigation." *Id.* at 557. The issue was not the validity of the state tax, but the authority of the federal court to enjoin a state court challenge to a state tax. Moreover, as the court noted in *Bridges*, *Dunn* is inapplicable because it only supports the proposition that taxpayers can use the federal courts to assert a claim for the collection of taxes imposed by a federal consent decree and the Tax Injunction Act does not prevent jurisdiction over such a suit. 334 F.3d at 416. Here, however, like *Bridges*, the district court was being asked to decide how state taxes should be calculated and assessed. *Appling County v. Municipal Electric Authority of Georgia*, 621 F.2d 1301 (5th Cir. 1980), also involved a state seeking to collect a tax from a group of taxpayers and not to have a state tax declared unconstitutional. The Fifth Circuit easily distinguished this case in *Bridges*. 334 F.3d at 421.

Wells v. Malloy, 510 F.2d 74 (2nd Cir. 1975), challenged Vermont's statute that revoked a person's right to operate a motor vehicle if the person was in default of an obligation to pay the state tax on motor vehicle purchase and use. The action was not a challenge to the tax itself and the court only addressed the issue of "collection." In *Sipe v. Amerada Hess Corporation*, 689 F.2d 396, 403 (3rd Cir. 1982), another case cited by Respondents, the Third Circuit questioned whether *Wells* survives the reasoning in more recent decisions of this Court.

In re Jackson County, 834 F.2d 150 (8th Cir. 1987), fails to analyze the Tax Injunction Act issue other than to cite *Appling County*. In any event, *Jackson County* did not involve a challenge by a taxpayer to a state tax, but the authority of a federal judge to order the imposition of a tax to fund a school desegregation order.

In sum, the circuit courts are in conflict over how to interpret the Tax Injunction Act and the principles of comity. This Court should grant certiorari to resolve the conflict by clarifying that the Tax Injunction Act and the fundamental principle of comity between federal courts and state governments in the area of state taxation require the dismissal of Respondents' lawsuit challenging Arizona's tax credits.

III. The Tax Injunction Act and the Principles of Comity Prohibit Federal District Court Interference with the Administration of a State's Tax System.

Respondents essentially argue that the common definition of the term "assessment" is not the one Congress intended because it only intended to prohibit interference with the collection of state taxes. Op. at 14. This argument ignores the plain meaning of the term "assessment," the rules of statutory construction, and this Court's understanding of the broad scope of the Tax Injunction Act. *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 512 (1981) ("The Tax Injunction Act generally prohibits federal district courts from enjoining state tax administration except in instances where the state court remedy is not plain, speedy and efficient.")

Respondents cite to decisions that hold that the Tax Injunction Act does not prohibit suits to collect a tax. Op. at 14-15. But Respondents' lawsuit does not request the district court to authorize the collection of taxes; it requests the court to invalidate a tax credit. Therefore, these decisions do not support their argument.

The Respondents then essentially argue that the term "assessment" is nothing more than another way of saying

collection. The Tax Injunction Act prohibits suits in federal district court that "enjoin, suspend, or restrain the *assessment*, levy *or* collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such state." 28 U.S.C. § 1341 (emphasis added). Because Congress used both the term "assessment" and "collection," it intended each term to have a different meaning. *See Sec. & Exch. Comm'n v. McCarthy*, 322 F.3d 650, 656 (9th Cir. 2003) ("It is a well-established canon of statutory interpretation that the use of different words or terms within a statute demonstrates that Congress intended to convey a different meaning for those words.") (citing *Russello v. United States*, 464 U.S. 16, 23 (1983)).

Respondents argue that two rules of statutory construction – *noscitur a sociis* and *ejusdem generis* – establish that Congress did not intend for the term "assessment" to be given its plain meaning, but intended "assessment" to be given a meaning that relates to the "levy" and "collection" of taxes. Op. at 16-17. To the contrary, the rule *noscitur a sociis* establishes that the term "assessment" in the Tax Injunction Act must mean something different than the terms "collection" and "levy." The maxim *noscitur a sociis* defines a term based on the words around it and applies where a word is capable of many meanings. *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961). This is not an "inescapable rule," however, and "[t]he statute admits a reasonable construction which gives effect to all of its provisions." *Id.* at 307-08. This Court noted that "[i]n these circumstances [it] will not adopt a strained reading which renders one part a mere redundancy." *Id.* Respondents' argument that the term "assessment," means nothing more than "collection" would create a redundancy not intended by Congress. The principle of *ejusdem generis* provides that a general statutory term should be construed in light of the specific terms that precede it. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (quoting 2A N. Singer, *Sutherland on Statutes and Statutory Construction* § 47.17 (1991)). The principle of *ejusdem generis* is not helpful in interpreting the Act because it does not contain a "general term" such as "other tax procedure," that follows the

specific terms "levy," "collection," and "assessment." Each one of these words has its own distinct meaning in the tax context and must be interpreted accordingly.

Finally, Respondents erroneously argue that the Court's consideration of Establishment Clause challenges to state tax credits or deductions establishes that the district court had jurisdiction in this case. Op. at 18-19 (citing *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), and *Mueller v. Allen*, 463 U.S. 378 (1983)). It is well established that the exercise of jurisdiction in a case is not precedent for the existence of jurisdiction where it is not raised by the parties or discussed by the court. *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952). Because the Tax Injunction Act was not raised or discussed in *Nyquist* or *Mueller*, those cases do not support Respondents' argument that their lawsuit is not prohibited by the Tax Injunction Act.

As the Court has noted, the Tax Injunction Act and the Court's decisions that preceded its enactment "reflect[s] the fundamental principle of comity between federal courts and state governments that is essential to 'Our Federalism.'" *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 103 (1981). Although Congress was concerned about federal judicial decisions that would directly interfere with the collection of state taxes, it was also concerned about the principles of comity that preclude interference with state tax systems. Congress therefore did not limit the language of the Tax Injunction Act to only prevent interference with the "collection" of state taxes but also the interference with the "assessment" of state taxes. Because Respondents' lawsuit interferes with the assessment of Arizona taxes, it is precluded by the Tax Injunction Act. It is also precluded by the principles of comity.

CONCLUSION

The Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX I

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February 7, 2003

Ms. Paula S. Bickett
Chief Counsel, Civil Appeals
Attorney General's Office
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Re: *Winn v. Hibbs, No. 01-15901*

Dear Ms. Bickett:

The panel has asked me to respond to your motion for clarification and to reassure that the orders recalling the prematurely issued mandate and directing the parties to file simultaneous briefs has suspended the finality of the judgment.

If you have any further questions, I can be reached at (415) 556-9811.

Sincerely,

//s// Cathy A. Catterson

Cathy A. Catterson
Court Executive/Clerk of Court

cc: All Counsel